Case No. 15035

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

INTERMOUNTAIN EQUIPMENT COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,

ON PETITION TO REVIEW AND SET ASIDE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Brief of the Petitioner Intermountain Equipment Company

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Brief of the Petitioner Intermountain Equipment Company

INTRODUCTION

This case is before this Honorable Court upon a petition (R. 275) of Intermountain Equipment Company, an Idaho corporation with its home office and principal place of business at Boise, Idaho, hereinafter called the company, which petition was duly filed pur-

suant to the provisions of the Labor Management Relations Act of 1947, as amended, (Chapter 120, 61 Stat. 136 *et seq.;* 29 U. S. C. A., §141 *et seq.* 1955 pocket part), hereinafter called the Act, and by which petition the company seeks to have this Honorable Court review and set aside a certain Decision and Order (R. 79) made and entered against the company by the National Labor Relations Board, an agency of the government of the United States of America, hereinafter called the Board. In its answer the Board has requested that its order be enforced (R. 282). (The citation "R." followed by a number refers to pages of the printed Transcript of Record.)

JURISDICTION

The company is a corporation organized and existing under and by virtue of the laws of the state of Idaho, with its home office and principal place of business being located at Boise, Idaho (R. 10). All of the acts and conduct constituting the alleged unfair labor practice with which the company is charged occurred in Boise, Idaho within the geographical area of the Ninth Circuit. The Board has an office and a Regional Director located in Seattle, Washington, known as its Nineteenth Region, within the geographical area of the Ninth Circuit. The charge and complaint (R. 9) upon which these proceedings originated issued out of that Nineteenth regional office of the Board. This Honorable Court has jurisdiction to hear and determine this case by virtue of Section 10 (e) and (f) of the Act (29 U. S. C. A., § 160 (e) and (f), 1955 pocket part.)

STATEMENT OF THE CASE

The company is engaged in the business of selling and supplying heavy industrial and construction equipment. In the spring of 1953 the General Teamsters, Warehousemen and Helpers, Local Union No. 483, hereinafter called the union, organized certain of the company's warehouse employees at its Boise operation, and after the Board conducted an election it certified the union as the collective bargaining representative of those of the company's employees in the following described unit:

> "All warehouse employees of Intermountain Equipment Company, construction machinery, equipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, countermen, order clerks, delivery men, inventory clerks and warehouse filing clerks, excluding all managers, assistant managers, foremen, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act". (R. 10, 11)

The union was certified on June 26, 1953 (R. 10) and on or about July 3, 1953 Frank Baldwin, secretary-treasurer of the union, contacted Philip Dufford, the company's vice-president and general manager, regarding a contract, and negotiating meetings began on July 22 (R. 98). The union submitted its proposals to the company in the form of a written proposed contract containing provisions commonly found in labor contracts, including provisions on wages, hours, overtime, vacations, holidays, union shop, grievance settlement procedure, etc. *The union's original written*

proposal also included proposals for year-end bonuses and for a specified number of days of paid sick leave (R. 98). *The union's written proposal also included a provision to the effect that the employees would retain the special privileges previously enjoyed* (R. 212, 219).

The negotiations were conducted by Baldwin, Roy Buntin, and Alvin Stewart (the latter two being employees in the unit) for the union, and by Dufford and Ray Fortune (a labor relations consultant not connected with the company) for the company (R. 113, 114.) Approximately six or seven meetings were held between July 22 and July 27, 1953 and on the latter date an agreement was reached which was reduced to writing and executed by the company and the union (G. C. Ex. 3, R. 103). This written agreement provided, among other things, for union shop, paid holidays and vacations, grievance settlement procedure, overtime after eight hours per day and forty hours per week, and for a wage increase of approximately 26¢ per hour (R. 235). No similar increases or guaranty of benefits were given by the company to its employees who were not in the unit (R. 238, 239). *This agreement did not provide for year-end bonuses, paid sick leave, or a retention of privileges clause, all of which had been proposed by the union.*

For several years prior to the union's certification the company had customarily paid year-end bonuses to substantially all of its employees, including those whose job classifications were in the unit (R. 153). However, the company had no formalized plan

and it considered the payment of a bonus to individual employees to be a matter of discretion and strictly a prerogative of management (R. 149, 150, 151). The company rejected the union's demands to include a bonus clause in the contract, and although the issue was discussed at length in negotiations the contract as finally agreed to and executed did not include a bonus clause (R. 102, 233).

Also prior to the union's certification the company had no formalized practice with respect to compensated absences from work because of sickness or otherwise. Generally the matter of compensation for time not worked was left to the discretion of the company's various department heads, and it appears that the employees were not docked for occasional absences from work because of sickness, personal errands, or otherwise (R. 154, 155). The department heads or foremen kept the time records, and no record was kept as to the reason for absence if an absence was in fact shown on the time sheet (R. 154). The company rejected the union's demands to include a sick leave clause in the contract, and although the issue was discussed at length in negotiations the 1953 contract as finally agreed to and executed did not include a sick leave clause (R. 102, 154).

When the union was certified and a collective bargaining agreement was reached the company installed a time clock for the use of the employees in the unit. Thereafter an accurate record was kept of the hours worked by each employee in the unit and time not worked was not compensated for (R. 157, 160).

At the end of 1953 the company paid year-end bonuses to substantially all of its employees who were not in the unit, but no bonuses were paid to the employees in the unit (R. 12, 17).

On or about January 11, 1954 the union filed a charge with the Nineteenth Regional Office of the Board alleging that the company's failure to pay bonuses constituted an unfair labor practice in violation of the Act (R. 3). On or about March 8, 1954 the union filed an amended charge alleging that the company's failure to pay sick leave and bonuses constituted an unfair labor practice in violation of the Act (R. 5).

At no time has the union or any of the employees made any claim against the company for nonpayment of bonuses or sick leave through the grievance machinery provided in the contract (R. 206-208, 222-223, 227, 239).

During the early summer of 1954, while the charges were still pending, but before they had been acted upon by the Board, the company and the union met and bargained on a new contract. The union again proposed a bonus clause and a sick leave clause, as well as a demand for a wage increase (R. 228,229). As a result of those negotiations a new contract was reached to be effective July 27, 1954 (the expiration date of the first contract). In the new contract the company granted a wage increase and a sick leave clause, but the proposal of the union as to bonuses was again rejected by the company, and the union accepted the contract without a bonus clause (R. 228, 229, 239).

Thereafter, on September 7, 1954, about nine months after the original charge had been filed, the Board issued its complaint against the company, designating the case as Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers, Local Union No. 483, Case No. 19-CA-948, in effect alleging that the company was guilty of refusing to bargain and of unlawful discrimination in violation of Sections 8 (a), (1), (3), and (5) of the Act (R. 9). On or about September 15, 1954 the company filed its answer and on or about September 27, 1954 its amended answer admitting the jurisdictional facts and denying the commission of the unfair labor practices alleged (R. 14, 19).

A hearing was held on September 28, 29 and October 1, 1954 in Boise, Idaho before James R. Hemingway, Esq., a Trial Examiner appointed by the Board to hear the case, and on or about December 8, 1954 the Trial Examiner made and entered his Intermediate Report (R. 23) wherein he found and concluded that the company had not refused to bargain with the union within the meaning of Section 8 (a) (5) of the Act as charged, and he accordingly recommended that the complaint be dismissed as to the refusal to bargain charge. However, he further found and concluded that the company had discriminated in regard to the terms and conditions of employment of its employees in the unit within the meaning of Section 8 (a) (3) of the Act, and he recommended certain remedial action therefor (R. 61-63).

Thereafter on or about January 7, 1955 the com-

pany duly filed its written Exceptions to the Trial Examiner's Intermediate Report (R. 65), and a brief in support of its Exceptions. At approximately the same time the union filed its brief in support of the Intermediate Report.

Thereafter, on or about December 16, 1955 the Board, by a panel of three of its members, entered its Decision and Order whereby the Board adopted the findings, conclusions and recommendations of the Trial Examiner (R. 79). Said Decision and Order adopted and confirmed the finding of the Trial Examiner to the effect that the company had not refused to bargain as alleged, and accordingly the Board dismissed the complaint insofar as it alleged that the company had violated Section 8 (a) (5) of the Act (R. 87). The company does not seek review of that portion of the Board's Decision and Order.

Said Decision and Order found and held that the company had violated Section 8 (a) (1) and (3) of the Act by not paying bonuses in 1953 to its employees in the unit and by not compensating them for absences from work due to illness. The Decision and Order required the company to cease and desist from the commission of the alleged unfair labor practices, to post the usual notices and to make certain payments to the employees in the unit (R. 85-87).

This Decision and Order of the Board was not unanimous, but rather it was a two-to-one decision, the Honorable Boyd Leedom, Chairman, having written a vigorous dissent (R. 88-93).

Thereafter the company filed its motion with the Board seeking reconsideration and an opportunity for oral argument, which motion was summarily denied by the Board on or about January 26, 1956. The company thereupon filed its petition (R. 275) with this Honorable Court seeking review of the Board's Decision and Order and praying that the same be set aside. The Board, in its answer to the company's petition, seeks enforcement of the Decision and Order (R. 282).

STATEMENT OF POINTS

POINT NO. I

THE BOARD ERRED IN FINDING AND CONCLUDING THAT THE COMPANY'S PRACTICES REGARDING BONUSES AND SICK LEAVE HAD THE INHERENT EFFECT OF DISCOURAGING UNION MEMBERSHIP IN VIOLATION OF SECTIONS 8 (a) (1) AND (3) OF THE ACT.

POINT NO. II

THE BOARD ERRED IN FINDING THAT THE COMPANY MAINTAINED A PRACTICE OF COMPENSATING ITS EMPLOYEES FOR ABSENCES DUE TO SICKNESS PRIOR TO JULY 27, 1954.

POINT NO. III

THE BOARD ERRED IN FAILING TO FIND THAT THE COMPANY AT NO TIME EVIDENCED ANY ANTI-UNION MOTIVE OR FEELING.

POINT NO. IV

THE BOARD ERRED IN ORDERING THE COMPANY TO TAKE CERTAIN ACTION TO REMEDY THE ALLEGED VIOLATIONS OF THE ACT, INCLUDING THE MAKING WHOLE OF ITS EMPLOYEES WHO SUFFERED AS THE RESULT OF NONPAYMENT OF BONUSES AND SICK LEAVE.

SUMMARY OF ARGUMENT

POINT NO. I

Section 8 (a) (5) of the Act does not outlaw *all* differential treatment of employees. To establish a violation of that Section the Board must show by a preponderence of the evidence not only that the employer discriminated, but also that the purpose, motive, or intent of the discrimination was to encourage or discourage union membership or activity.

This purpose or motive of the employer is the element which actually controls the final determination as to whether or not the conduct is unlawful.

While such purpose or motivation may be inferred in the absence of any direct evidence of motivation, where the discrimination is of such a nature that it inherently encourages or discourages, it should not be inferred so as to find an employer guilty of *discouraging* union membership in the face of uncontroverted direct evidence that the employer had no anti-union motive or feeling and had at all times dealt with the union in good faith.

POINT NO. II

There is not substantial evidence in the record considered as a whole to support the finding that the company had an established sick leave policy prior to July 27, 1954 when it executed a written contract with the union which provided paid sick leave to the employees in the unit. Consequently all of the findings, conclusions, and inferences to the effect that the company

discrimated against the employees in the unit by denying them sick leave are in error.

POINT NO. III

The company at no time displayed any anti-union feeling or motive. This is clear from the testimony of the union's own witnesses. In view of the uncontroverted evidence the Board erred in failing to make an express finding to this effect.

POINT NO. IV

The Board should not, and in the past has not, entered into the field of collective bargaining to write or rewrite contracts between the parties. The action of the Board in this case is to bestow upon the employees in the unit benefits which it may think the union should have won for them at the bargaining table but failed to do so. Such action by the Board detracts from and discourages good faith collective bargaining and thereby does violence to the purposes of the Act.

ARGUMENT

POINT NO. I

THE BOARD ERRED IN FINDING AND CONCLUDING THAT THE COMPANY'S PRACTICES REGARDING BONUSES AND SICK LEAVE HAD THE INHERENT EFFECT OF DISCOURAGING UNION MEMBERSHIP IN VIOLATION OF SECTIONS 8 (a) (1) AND (3) OF THE ACT.

The Board has concluded that the company's "disparate treatment concerning bonuses and sick leave had the inherent effect of *discouraging* union membership and therefore constituted a violation of Section

8 (a) (3) and (1) of the Act *** ". (R. 81, emphasis added). The pertinent provisions of those sections of the Act are as follows:

> Section 8. Unfair labor practices
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the excercise of the rights guaranteed in section 7 of this act;
>
> ****
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to *encourage* or *discourage* membership in any labor organization: **** (emphasis added).

It should be noted that Section 8 (a) (3) does not outlaw *all* differential treatment of employees as such. Only such discrimination as encourages or discourages membership in a labor organization is prohibited, and it is as much a violation to *encourage* as to *discourage*. As the Supreme Court of the United States has said:

> The language of § 8 (a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed. *Radio Officers Union* v. *N. L. R. B.*, (U. S. Sup. Ct., Feb. 1, 1954) 347 U. S. 17, 74 S. Ct. 323, 337.

The relevance of the employer's motive in a discrimination case is of prime importance in determining whether or not the conduct complained of is in fact a violation of Section 8 (a) (3). As the Board has repeatedly stated:

> Upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute. *The Board requires that a preponderance of the evidence show an employer's illegal motive in order to establish a violation of 8 (a) (3)*, except in case of per se violations such as the discharge of an employee because of activities protected by the statute. *The burden of proving unlawful motivation rests with the General Counsel.* (Sixteenth Annual Report of the National Labor Relations Board, page 162, emphasis added).

The United States Supreme Court recognized this principle in the *Radio Officers* case, supra, when it said:

> The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8 (a) (3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 628, 81, L. Ed. 893, in which we upheld the constitutionality of § 8 (3), we said with respect to limitations placed upon employers' right to discharge by that section that "the [employer's] true purpose is the subject of investigation with full opportunity to show the facts." In another case the same day we found the employer's "real

motive" to be decisive and stated that "the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of § 8 (a) (3). For example, a recent report states that "upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute."

> That Congress intended the employer's purpose in discriminating to be controlling is clear. *** (*Radio Officers* case, supra, 74 S. Ct. 323, 337).

In the instant case the company's alleged violation is one of *discouraging* union membership. What are the facts relied upon by the Board to support a finding of this violation?

Prior to the certification of the union the company ran its business and regulated the wages, hours, and working conditions of its employees as it saw fit, without any contractual obligations. The company was free to increase or decrease wages; change, modify or terminate fringe benefits; pay or not pay bonuses, etc. The company had no contractual obligation to maintain any existing conditions for any of its employees, but rather it was free to make such changes as its management considered to be in the best interests of the company. There was nothing to

prevent wage and benefit changes from day to day or week to week. This was true with the payment of bonuses also.

When the union was certified as the collective bargaining agent for the unit described above and a collective bargaining agreement was negotiated and executed, the company's relationship *with its employees in the unit* was substantially changed. The company's freedom of action was greatly restricted by (1) the provisions of the Act which required the company to bargain with the union rather than deal with the employees direct, and (2) the provisions of the contract which absolutely committed and obligated the company to the terms and conditions therein contained, and fixed a minimum on wages and other economic benefits below which the company could not go during the life of the contract. The union did not represent and the contract did not apply to and protect *all* of the company's employees. Only about 13 or 14 out of approximately 65 employees at the Boise establishment were in the unit (R. 188, 149). *All* of the employees in the unit enjoyed the benefits and protection of the union contract. *None* of the employees outside the unit enjoyed those benefits and that protection. There is no evidence in the record, and indeed it is not claimed by the Board, that the company engaged in any disparate treatment of various employees *within the unit.* On the contrary, all employees within the unit were treated exactly alike, whether they were union members or not. There is no evidence to show disparate treatment on the basis of membership or non-member-

ship in the union, either within or without the unit, except for the lawful discrimination inherent in the provisions of a union shop clause contained in the contract, put there at the request of the union and with the blessing of the Act.

Now since those employees in the unit represented by the union received, through collective bargaining and were guaranteed by written contract, many benefits which those employees not in the unit and not so represented did not receive and were not guaranteed, it may well be argued that those employees not in the unit were thereby inherently encouraged by the company to seek membership in a labor organization, and that the company was thereby guilty of the violation of *encouraging*. The company is charged, however, not with encouraging, but rather with discouraging union membership by its handling of bonuses and sick leave.

(a) Bonus Payments

For several years prior to 1953 the company had paid year-end bonuses to substantially all of its employees, including those whose job classifications subsequently were included in the unit. The company had no formal bonus plan, and it consistently took the position that the payment of the bonuses was strictly discretionary and a prerogative of management (R. 99, 149-151). During the negotiations leading to the 1953 contract the union's demand for a bonus clause was discussed and rejected by the company, its general manager, Mr. Dufford, taking the position that payment of bonuses was a prerogative of management and that the company could not and would not be bound

by contract to pay bonuses. Dufford further stated that the company did not intend to discriminate as to the payment of bonuses (R. 265). The contract as signed did not contain a bonus clause.

At the end of 1953 the company paid bonuses to substantially all of its other employees, but it did not pay bonuses to any of the employees who were in the unit and covered by the contract (R. 12, 17). There is nothing in the record to show that there was discrimination on the basis of union membership or nonmembership. The criterion was whether or not the employee was in the unit and covered by the contract.

(b) Sick Leave

It is the company's position that prior to the 1954 contract when a sick leave provision was written covering employees in the unit the company had no sick leave policy, and that the Board erred when it found to the contrary. This point is argued at length under Point II, infra.

The Board has concluded, however, that the company's practices regarding sick leave constituted a violation of the Act.

Prior to the certification the company had no time clock and it did not keep accurate records of actual hours worked. Time records were kept by the various foremen and occasionally an employee would be absent from work for a few hours or a day and would not be docked for it. There was no policy with regard to this and the foremen exercised considerable discretion. There was no paid sick leave as such, al-

though the union's 1953 proposals contained a sick leave clause which was discussed and rejected. The signed contract did not include a sick leave clause.

With the certification and subsequent contract the company installed a time clock and for the first time kept accurate time records. Instructions were given to the foremen that the employees were to be paid only for hours worked as shown by the time clock records.

This is the disparate treatment complained of. The Board has said little or nothing about the company's motives, but rather has stated that under the *Radio Operators* case, supra, the requisite motive can be inferred. It is true that in that case the Supreme Court said:

> But it is also clear that *specific evidence of intent* to encourage or discourage is not an indispensable element of proof of violation of § 8 (a) (3). *** (ibid 74 S. Ct. 323, 338, emphasis added).

However, we submit that the *Radio Officers* case does not stand for the proposition that an employer may be convicted of a violation of § 8 (a) (3) upon evidence showing nothing more than that he treated some of his employees in other departments and jobs differently than he treated employees in one department or unit for which the Board had certified a union as collective bargaining representative. That is essentially the instant case.

The unit found by the Board to be appropriate for purposes of collective bargaining was made up of the company's parts department employees, who, because

of the nature of their work, were paid on an hourly basis. The company's other employees were paid on a salary basis (R. 162-164). The union was the exclusive bargaining representative for *all* of the employees in the unit, and the collective bargaining agreement covered *all* of the employees in the unit. There was no disparate treatment among employees within the unit. Consequently the instant case is clearly distinguishable from the facts of the *Radio Officers* case wherein the Supreme Court said:

> The union's representative status obviously does not effect the legality of the gratuitous payment. According to the reasoning of the Second Circuit, however, disparate payments based on contract are illegal only when the union, as bargaining agent for both union and non-union employees, betrays its trust and obtains special benefits for the union members. That court considered such action unfair because such employees are not in a position to protect their own interests. Thus, it reasoned, if a union bargains only for its own members, it is legal for such union to cause an employer to give, and for such employer to give special benefits to the members of the union for if non-members are aggrieved they are free to bargain for similar benefits for themselves.
>
> *We express no opinion as to the legality of disparate payments where the union is not exclusive bargaining agent since that case is not before us.* *** (*Radio Officers* case, supra, 74 S. Ct. 323, 339, emphasis added.)

We submit that if an employer is not guilty of unlawful *encouragement* where he gives special benefits to those of his employees represented by the union pursuant to contract while denying such benefits to

his unrepresented employees, the reverse should also be true, that is he is not guilty of unlawful *discouragement* where he gives special benefits to those of his employees not represented by the union while denying such benefits to his union represented employees whose contract does not call for such benefits. This must be true, for in the language of the Supreme Court, supra, if the union represented employees "are aggrieved they are free to [have the union] bargain for similar benefits."

While the requisite motive and intent to discriminate need not be established by specific evidence, we submit that the Board cannot reasonably infer that motive and intent in the instant case.

The company is charged with *discouraging* union membership. The record is barren of any showing or suggestion of anti-union motivation or feeling, and it abounds with evidence that the company at all times was conscious of its duties and obligations under the Act, and its dealings with the union were friendly, as is discussed in detail under Point III of this brief. In the initial contract, bargained in record time, the company agreed to a union shop clause and granted concessions on nearly all of the union's demands. Such conduct is certainly not typical of an employer seeking to undermine and discourage unionism. Here there is no background of anti-union activity or any overt act which can form the basis for any inference of anti-union motive or feeling. Yet in the face of that record the Board infers "an illegal motive" when the company pays a year-end bonus to its other employees but not

to those covered by the union contract. Such action by the Board is even more unreasonable when it is pointed out, as Chairman Leedom does in his dissenting opinion (R. 91), that the year-end bonus was less than half the amount of the hourly wage increase granted to the employees under the contract but not to the other employees.

We submit that in his dissenting opinion Chairman Leedom correctly analyzed the *Radio Officers* case, supra, when he stated:

> From the foregoing it appears that Radio Officers, insofar as here pertinent, holds merely, in effect, that the Board may infer intent to encourage or discourage union membership (a) where there is no countervailing evidence other than the employer's naked disclaimer of any such intent, and (b) where the treatment of union employees is obviously more favorable than the treatment of non-union employees. In my opinion neither of these conditions is present here (R. 89).

We submit that the instant case is not a proper one for the inference of an illegal motive. Nor is our conclusion in this respect contrary to previous Board policy as shown by the following administrative rulings of the Board's General Counsel:

Case No. 883 (January 13, 1954) 33 LRRM 1234, wherein the Regional Director was sustained in his refusal to issue a complaint charging violations of Section 8 (a) (1), (3), and (5) of the Act by withholding payment of a Christmas bonus from employees represented by the Union while paying such bonus to employees not represented by the Union. The report says in part:

The evidence is insufficient to establish an illegal motive in the failure to pay the bonus in view of (1) the absence of any contractual obligation to pay a bonus, (2) the economic reasons advanced to the company for not paying a bonus, (3) the attempt to balance the wage structure between the employees in the bargaining unit and those not in the unit, and (4) the absence of any union animus.

The only evidence of independent 8 (a) (1) violation is the foremen's statement to an employee who asked about the 1951 bonus, "When you guys walked out of the door, your Christmas bonuses went with you." This statement is not, in itself, violative of the Act in the light of its isolated character and the absence of any union animus on the part of the company.

Case No. 909 (March 25, 1954) 33 LRRM 1461, wherein the Regional Director was sustained in his refusal to issue a complaint charging violations of Section 8 (a) (1), (3), and (5) of the Act by withholding payment of a Christmas bonus from employees represented by the Union while paying such bonus to employees not represented by the Union. The report states:

The company paid a Christmas bonus to all employees in 1950 and 1951, based upon 5 per cent of gross earnings. The union was certified as representative of production and maintenance employees in October 1952, and negotiated a contract with the company. The contract provided for an 8-cent pay increase for employees in the unit. *The union asked if the contract would affect the bonus, and the employer replied that it would not as the bonus was discretionary anyway.*

In 1952, the company paid a Christmas bonus to its salaried employees only. At a meet-

ing requested by the union to discuss nonpayment of the bonus to employees represented by the union, the employer said it had decided not to pay the bonus to them because production had been lower and volume of shipments less. The employer also explained that the salaried employees had received the bonus in order to balance the wage structure, as these employees had received no increase equivalent to that obtained by employees in the unit.

In support of its position, the company supplied figures for only three of the six months on which the bonus would have been based. The employer's failure to present a complete record of its production figures was at most only a suspicious circumstance and not a violation of the Act. There was no independent 8 (a) (1) violation on the part of the company and no background of union hostility or antiunion motives. (Emphasis added)

The position of the Board is also contrary to court decisions. We submit that the case of *NLRB* v. *Nash Finch Company* (CA 8th, April 13, 1954) 211 Fed. 2d 622, 33 LRRM 2898, is directly in point and is controlling of the issues here. That case was on a petition of the Board for enforcement of its Order. The Board had found that the Employer had violated Sections 8 (a) (1), (3), and (5) of the Act by discontinuing *a well established program* of hospital and group life insurance to employees represented by the Union shortly after the Union was certified, and by refusing to pay those employees annual Christmas bonuses while continuing such benefits to other employees. Those other employees did not receive the wage increases which had been granted to those employees represented by the Union. The Board also found that the Employer

had repeatedly threatened to take such benefits away from the employees if they voted for the Union. (There is no similar finding of anti-union threat or feeling in the instant case). The insurance and bonus benefits which existed prior to the certification of the Union in that case were well established and in some instances a matter of contract between the Employer and individual employees. These benefits were discontinued after the signing of the contract with the Union, the terms of which were silent as to their continuance or discontinuance.

In denying enforcement of the Board's Order (which included a cease and desist order and an order to pay to the employees losses suffered as a result of the discontinuance of the insurance and bonus benefits) the United States Court of Appeals for the 8th Circuit said:

> We consider untenable the position of the Board that, although the respondent had assumed no contractual obligation to continue the insurance and bonus benefits which it had formerly provided for the employees represented by the Union, the respondent was obligated by law to continue such benefits unless and until it terminated them after further baragaining with the Union.
>
> ******
>
> *The respondent, we think, may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for.* "And it is *** clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining

agreements." National Labor Relations Board v. American National Insurance Co., 343 U. S. 395, 404 (30 LRRM 2147). Whether the contract in suit should have contained the clause proposed by the Union requiring the maintenance of existing standards of employment was "an issue for determination across the bargaining table, not by the Board." Id., page 409 of 343 U. S.

It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to obtain for them as a result of its collective bargaining with the respondent on their behalf.

Our conclusion is that the Board is not entitled to the enforcement of its order. Its petition for enforcement is denied. (211 F. 2d at p. 626, 627, emphasis added).

It should be noted that the *Nash-Finch* decision came down some two and one-half months *after* the *Radio Officers* case, and that one of the cases consolidated in *Radio Officers* was from the Eighth Circuit. Consequently it is reasonable to assume that the Eighth Circuit, in deciding *Nash-Finch* concluded that the rule laid down by *Radio Officers*, so heavily relied upon by the Board in the instant case, did not apply. This certainly supports the position of the dissenting Chairman and the petitioner herein.

It should also be noted that although petitioner strongly argued the *Nash-Finch* case in its briefs before the Board that the Board in its Decision and Order strangely fails to mention the case.

In conclusion of Point I we submit that upon the law and the facts as shown by the record the Board erred in finding and concluding that the company's practices regarding bonus and sick leave had the inherent effect of discouraging union membership in violation of § 8 (a) (1) and (3).

POINT NO. II

THE BOARD ERRED IN FINDING THAT THE COMPANY MAINTAINED A PRACTICE OF COMPENSATING ITS EMPLOYEES FOR ABSENCES DUE TO SICKNESS PRIOR TO JULY 27, 1954.

In its Decision and Order the Board stated that the company "had also maintained a practice of compensating its employees for absences due to sickness." (R. 80). This statement is not supported by substantial evidence on the record considered as a whole. Similar statements of the Trial Examiner were duly excepted to by the company (R. 68).

Mr. Dufford, vice president and general manager of the company, testified that in the contract with the union effective July 27, 1954 the company was required to keep a record of sick leave and pay sick leave up to six days per year (R. 154). During the life of the first contract (July 27, 1953, to July 26, 1954) there was no sick leave provision and no sick leave was paid (R. 154, G. C. Exhibit 3, R. 103). He further testified that prior to unionization the company had no established policy or practice governing sick leave (R. 155, 156), and that the company had no records which would show whether a given employee's absence from work was because of illness or some

other reason (R. 155). This testimony is undisputed and is entitled to consideration.

Prior to the signing of the first contract it is not denied that on occasion employees of the company have been paid while absent from duty (R. 157). Such cases were up to the supervisor of the employee involved, who had authority to authorize such payment whether the absence was caused by illness, errands, or otherwise. There was no established pattern or practice, and no ground rules regulating the supervisor in such matters (R. 155).

Frank Baldwin, the secretary-treasurer of the union, testified that he did not discuss the company's past practice regarding sick leave with Dufford in negotiations (R. 136, 139) and that actually he didn't know what the practice was.

From this the Board concludes that the company had a paid sick leave policy prior to the union being certified and that the company illegally and discriminatorily discontinued it as to the employees in the unit immediately upon signing the contract and continued it to the other employees.

When viewed in the proper light of all the facts this alleged unlawful and anti-union action becomes simple, logical, lawful and honest. It is undisputed that of all the company's employees, those comprising the bargaining unit lent themselves more readily to an hourly compensation basis than the others (R. 172), and that with the exception of occasional temporary help and some service employees who operated under

the Belo plan, the employees who made up the unit were the only ones paid on an hourly basis, the other employees being salaried (R. 163, 164, 172).

Prior to the union's certification time records on the hourly employees were kept by the supervisors. No record was kept as to the reason for absences, and a supervisor could, if he thought it proper, excuse an employee and have him paid for time not worked. While the company has always paid overtime at the rate of time and one-half for hours worked in excess of forty in a week no *daily* overtime or limit on hours was observed prior to the first contract. The company and its employees had been "satisfied with its own loose-knit way of doing business prior to that." (R. 159). The union contract, however, required payment of overtime for all hours worked in excess of eight in one day as well as in excess of 40 in one week (R. 104). Anticipating that to properly abide by and comply with a union contract the company should have more accurate records, Mr. Dufford had a time clock installed for use by the employees in the unit. When asked why he installed the time clock Mr. Dufford replied,

> A. For the protection, the benefit of the members of the unit and management, to be certain, and that we had to maintain an accurate record, which was not deemed necessary before. (R. 158)
>
> * * *
>
> Trial Examiner. See if I understand you correctly—you said that the reason for installing the time clock was because of the fact that you anticipated that you would be held to a stricter accounting, was that it?
>
> The Witness: Yes. And I also said that the installation of the time clock was for the bene-

> fit of the members of th unit as well as for management, and it gave us a record on which we might be able to stand, and I hoped that it would avoid any possible disputes over hours. (R. 171).

When the contract was signed the employees were instructed to punch out on the time clock whenever they left work for any cause. Thus the company had an accurate record upon which both sides could rely for figuring overtime pay, etc. The supervisors were instructed to abide strictly by the terms of the contract and to pay by the time clock records.

From this the Board concludes that the "practice of compensating its employees for absences due to sickness" was discontinued, and infers a corrupt and evil intent to discourage union membership thereby.

We submit that there was nothing illegal, immoral or unreasonable in the company's actions concerning the time clock and the strict application of the contract. With the signing of the contract the company incurred a daily overtime expense which it did not have before. It incurred wage claim and arbitration responsibilities which it did not have before. The steps taken by the company to insure adequate records and minimize disputes over hours were not only proper and reasonable, but are further evidence of the company's bona fide attempt to deal fairly with its organized employees.

The Board's statement that "paid sick leave was continued, however, for those employees not in the unit represented by the Union" (R. 81) is not only unsupported by substantial evidence but is patently

unfair and misleading. None of the employees other than those in the unit have any assurance of paid sick leave (R. 168). There is no evidence to the contrary. Those employees, being on salary, may have some advantages which hourly wage employees do not have, which are inherent in the nature of salary compensation, but this fact does not constitute unlawful discrimination.

In conclusion of the argument of Point II we submit that all the record shows is that the company made certain changes from its rather "loose-knit" operation and record keeping to a more accurate and businesslike way of handling its record keeping, and applied the terms of its contract to the facts shown by the records. Can it reasonably be argued that the employees have a vested right to continued lax and loose operation when their collective bargaining agent has successfully negotiated many substantial benefits and improved working conditions? Clearly not! And in the words of the *Nash Finch* case, supra, the company "may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for".

The record does not support a finding that the company had an established paid sick leave practice, and the Board's contrary finding is erroneous. Clearly there is no showing that the company's conduct in this regard constitutes such "disparate treatment" as has "the inherent effect of discouraging union membership."

POINT NO. III

THE BOARD ERRED IN FAILING TO FIND THAT THE COMPANY AT NO TIME EVIDENCED ANY ANTI-UNION MOTIVE OR FEELING.

Neither the Trial Examiner nor the Board found that the company had ever evidenced any anti-union motive or feeling, nor could they have so found since the record is completely devoid of any evidence to that effect. On the other hand both the Trial Examiner and the Board have failed to make an express finding of no anti-union motive or feeling, and in so doing both have ignored substantial and uncontroverted evidence, including the testimony of the union's own witnesses.

The failure of the Trial Examiner to make such an express finding was duly excepted to by the company (R. 78).

We respectfuly refer the Honorable Court to the following portions of the testimony of Frank T. Baldwin, Secretary-Treasurer of the union:

> Q. At no time was there a refusal to bargain on the part of the Intermountain Equipment Company?
>
> A. You mean during the first meeting?
>
> Q. Yes. Any of the meetings.
>
> * * *
>
> A. No. They never refused to bargain, no. (R. 123).
>
> Q. (Interrupting): There was heated discussion, in other words?
>
> A. That is it.
>
> Q. And some animosity, perhaps?
>
> A. Well, I wouldn't say animosity. It was just a heated discussion.

Q. It was conducted in a perfectly friendly spirit, was it?

A. That is right.

Q: In other words —

A. (Interrupting): I always do.

Q. In other words, the words flew thick and fast, but in an aura of peace, is that right?

A. That is right.

Trial Examiner: A friendly fight?

Mr. Weil: Let's trade punches?

The Witness: Yes, that is is right. (R. 124)

* * * *

Q. Throughout your experience with respondent, have you found respondent willing to bargain with you at all times?

A. I would say yes.

Q. Have you found them generally friendly or unfriendly in attitude toward you?

Mr. Weil: I object.

Trial Examiner: Oh, I think I will allow that.

A. Well, let me inquire please, in your question meaning friendly, how do you mean that "friendly or unfriendly"?

Q. That is, willing to agree to any proposals?

A. Yes, I will agree to that question.

Q. Willing to discuss grievances?

A. As near as I can remember, yes.

Q. Arising from the negotiations in 1953, leading to the contract of July 27, 1953, were you able to secure substantial hourly rate increases for the men in the unit?

A. I think they received a fair increase, yes. ***

(R. 229, 230).

Roy F. Buntin, an employee in the unit and a member of the bargaining committee, called as a witness of the General Counsel, testified:

Q. (By Mr. Weil): During the course of the negotiations, did Mr. Dufford make any statements concerning the company's attitude toward employees who had joined the union?

A. It was, I believe brought out during that meeting and possibly in some of the other meetings —

Q. By "that meeting," you mean the third meeting? A. The third meeting.

A. (Continuing): That his attitude toward the Union employees had changed and was not necessarily the attitude that he would have with other employees not included in the Union.

Trial Examiner: Who said that?

The Witness: Mr. Dufford.

A. (Continuing): He may not have said those exact words. As nearly as I can recall, that is what he said.

Trial Examiner: Which meeting was that?

The Witness: The third meeting. However, I believe that was brought out in several of the meetings, that was brought up, *that he didn't feel that he had the freedom to deal directly with the employees in the unit like he had with other employees, since they were in the Union, that he had to deal with the Union and not directly with the employees, and therefore, his relationship had changed.* (R. 183, 184, emphasis added).

* * *

Q. (By Mr. Smith): Mr. Buntin, on di-

rect examination you said that Mr. Dufford's attitude had changed since the Union was certified as the bargaining agent for the unit in question. Is that correct?

* * *

A. Let's see. As I understand it, I said that his attitude changed in respect to the employees in the unit — I believe, yes, his attitude had changed, I believe I testified that way.

Q. (By Mr. Smith): In what respect had Mr. Dufford's attitude changed?

A. As near as I can remember, *he said that he could not approach the persons in the unit like he could his other employees or like he could the unit employees before they joined the Union; he had to approach the Union as the bargaining agent, he didn't feel free to approach the employees on a personal basis. Words to that effect.*

Q. Would you call such an attitude anti-Union?

* * *

A. The general impression I received was that Mr. Dufford had an unfriendly attitude for some time after the Union was certified.

* * *

Q. (By Mr. Smith): Mr. Buntin, other than the statements you have previously referred to as expressions of Mr. Dufford's attitude — or changed attitude, I should say — did he at any time since certification of the bargaining unit make other statements or expressions which would indicate that his attitude had changed?

A. If I understand this question correctly, that would be after this apparent change of attitude in the third or fourth meeting — is that what you are referring to — or since the absolute certification?

Q. Since the certification.

The Witness: Repeat that question, please.

Trial Examiner: Read the question.
(Question read.)

A. As I understand that, that his attitude might have changed from an unfriendly attitude to a more friendly attitude.

Q. (By Mr. Smith): You say it had changed from an unfriendly attitude to a more friendly attitude?

A. Possibly during the last two sessions of bargaining, there was semblance of a friendly attitude reached.

Q. During bargaining, however, the atmosphere was unfriendly, during the early stages or first few meetings?

A. Probably the most heated argument came during the third meeting. *I don't believe there was any unfriendly argument, possibly, at any other time, and I wouln't say that that was absolutely unfriendly.*

Q. What was that argument concerning?

A. It was concerning the bonus issue, as I remember, the most heated argument concerned the bonus issue.

Q. Subsequent to negotiations and after the contract had been entered into in 1953, did Mr. Dufford take any action or make any statement which reflected an anti-Union attitude?

A. No, I don't believe he made any statement, as I remember, that reflected an unfriendly attitude.

Q. Has Mr. Dufford ever refused to meet with you at your request or with the bargaining unit which you represent, at your request or Mr. Baldwin's request, to your knowledge?

A. No. The meetings might have been delayed sometimes because he wasn't available

for some reason, but I don't recall of any meeting being refused.

Q. Has Mr. Dufford, to your knowledge, ever refused to discuss any matter involving the terms or conditions of your employment or the Union contract, with you or with the bargaining unit?

A. Not that I recall. (R. 200, 201, 202, emphasis added).

The gist of the above testimony clearly shows that Mr. Dufford was cognizant of the obligations imposed upon him by the Act to bargain with the union as the certified bargaining representative of the employees and not deal with them directly. The record is clear that he was always willing to bargain and did so in good faith. The company never refused to bargain, and although the complaint charged such a refusal (R. 13) the Trial Examiner and the Board properly dismissed that portion of the complaint. The record shows that while some of the negotiation sessions were heated (which certainly is not unusual) the company bargained in good faith and gave substantial concessions, and there was no animosity.

In addition to the above testimony of the company's friendliness the record shows the following which we may call "plus" factors in evaluating the company's motive and feeling:

(1) The granting of a union shop clause in the initial contract. No employer who is seeking to undermine a union and discourage union membership is going to agree to a union shop clause as readily as the company did here.

(2) The speed with which the first contract was negotiated. Negotiations started July 22 and an agreement was reached July 27. This is certainly a record time for an original agreement where each provision must be negotiated from scratch.

(3) The substantial size of the original wage increase, some twenty-six cents or in excess of twenty per cent. To those familiar with labor practice such an increase is certainly larger than the usual.

(4) The willingness of the company to negotiate on the 1954 contract, even though charges had been filed against it by the union. The 1954 negotiations again showed the company's good faith when the company again gave substantial concessions, including the union's requested sick leave and a further wage increase of fiteen cents. (Parenthetically it might be added that the company again bargained in 1955 and agreed with the union to a two year contract which included a twenty cent wage increase and additional holidays. This case was pending before the Board all during that time.)

(5) The lack of grievances or disputes in the administration of the contract (R. 239). While the company does not contend that the employee's failure to use the grievance machinery in the contract to recover claimed bonuses or sick leave bars the Board proceedings or constitutes a defense thereto, we do contend that such failure indicates that the employees knew and believed that the company had no legal or moral obligation to pay the sick leave and bonuses.

(6) The fact that during the entire history

of the relationship between the company and the union there have been no strikes, lockouts, work stoppages, slowdowns or other labor disputes. The company's relationship with the union has certainly been far better than average.

The testimony above and the foregoing plus factors should be viewed and considered in the light of one other factor — *that there is no direct or indirect evidence in the record of any anti-union motive, feeling, or conduct.* There is no background of hostility from which such motive or feeling can be inferred. And the testimony and the plus factors show the exact opposite. The company is entitled to have the conduct complained of viewed in the clear light of its lack of anti-union bias.

The United States Court of Appeals for the Seventh Circuit has recently said:

> After a careful perusal of the record, we are convinced that the decision of the Board is clearly erroneous. We think it pertinent to observe that the Board has long pressed upon courts the importance to be attached to a hostile anti-union attitude on the part of an employer in characterizing its acts. This has often been referred to as background, and in innumerable cases has been utilized for concluding that an act by an employer, otherwise innocent, is discriminatory. *Conversely, we think that an employer with a friendly, sympathetic union attitude is entitled to credit in characterizing its acts which in themselves may not be discriminatory.* We doubt if any case has been before this or any other court where there is such an undisputed demonstration of lack of all hostility or anti-union bias. * * * *N. L. R. B.* v. *Chronicle Publishing Co.* (CA 7th, March 2, 1956)

230 F. 2d 543, 547; 37 LRRM 2632, 2635, emphasis added.

The Board argues that the company's statements during negotiations to the effect that it did not intend to discriminate against the represented employees with respect to bonuses and sick leave evidences bad faith, since those statements were "part of the context in which the employer acted". This position of the Board raises the question of how binding the multitudinous statements made during negotiations will be held to be even though not included in the agreement finally reduced to writing and signed. This question will be discussed under Point No. IV. However, the statement of the Board to the effect that:

> It seems unlikely that an employer motivated by no anti-union considerations would deprive only his represented employees of substantial benefits given unrepresented employees and which the former had been led to believe would be continued, without first explaining to them or their representatives why the changes were made (R. 84).

disregards and is contrary to three things which the record clearly shows: (1) that at no time did the company say that the benefits would be continued, but only that they were discretionary with the company and the company would not contractually agree to continue them; (2) that there never was an established sick leave policy prior to the union's 1954 contract; and (3) that the benefits guaranteed to the represented employees by the contract, including wage increases which the others did not receive, were of a considerably greater value than the bonuses.

We submit that dissenting Chairman Leedom was correct in refusing to infer an illegal motive from the statements relied on by the Board. The sick leave issue was not a withdrawal of an established sick leave practice at all, but was rather an improvement in record keeping and the substitution of contract terms for the discretion formerly exercised by the supervisors. The discontinuance of the bonus was explained by the uncontroverted testimony of Mr. Dufford:

> Trial Examiner: From your answer, I think probably the question I had in mind has been inferentially answered. However, I will ask it specifically. Why were the employees in the unit not included in the bonuses that were given in 1953.
>
> The Witness: Because we had a contract of employment with those people by which we guaranteed and had to live by the contract which bound us to certain terms with those people, such specific binding agreement not existing with the other people, and by the terms of which contract, we could incur considerable expense. Also due to the fact that there was a possibility that payment of a bonus could, under certain sets of circumstances become a violation of our contract or a violation of the — wait just a minute — that unfair labor charges could be filed against us or conceivably could be filed for payment of a bonus. (R. 269).

This certainly is a reasonable and lawful explanation of what the Board calls totally unexplained disparate treatment.

In conclusion of the argument of Point No. III we submit that it is the duty of the Trial Examiner and the Board to make findings on all of the material

aspects of the case. Certainly the company's motive is an essential part of a discrimination case, as was pointed out under Point No. I of this brief. While an illegal motive may be inferred in a proper case, such a motive cannot reasonably and should not be inferred in the face of direct and uncontroverted evidence of friendliness and non-hostility as appears here. The company was entitled to a finding of friendliness and non-hostility and the Board erred in failing to make such a finding. When viewed in the light of such a finding the company's conduct of which complaint is made clearly loses the taint of illegality which the Board has artificially attached.

POINT NO. IV

THE BOARD ERRED IN ORDERING THE COMPANY TO TAKE CERTAIN ACTION TO REMEDY THE ALLEGED VIOLATIONS OF THE ACT, INCLUDING THE MAKING WHOLE OF ITS EMPLOYEES WHO SUFFERED AS THE RESULT OF NONPAYMENT OF BONUSES AND SICK LEAVE.

The Board, having found that the company violated the Act by discontinuing bonuses and paid sick leave for the employees represented by the union, has ordered the company to make whole those employees who, during the term of the 1953 contract, suffered a loss by reason of the alleged discrimination by paying them the money lost (R. 86).

It is fundamental that the primary purpose of the Act is to promote and encourage the principle of collective bargaining in labor relations. The Board should not, and has not in the past taken a seat at the bargaining table and negotiated a contract for the

parties. The cases are too numerous for citation where the courts have held that while the Act does require an employer to bargain in good faith with the duly authorized representative of his employees it does not require nor can the Board compel the employer to make concessions or to reach an agreement on any given issue.

The union's original contract proposal included requests for specified bonuses (one month's pay) and a specified number of days paid sick leave. (Note that the proposals were not merely for continuation of existing practices). Both proposals were thoroughly discussed during negotiations and rejected by the company, and the union agreed to and signed a contract which did not provide for either. During the following year's negotiations the union again proposed bonus and sick leave provisions. Again both were thoroughly discussed and the company agreed to sick leave provisions and again rejected the bonus proposal. The union again agreed to and signed a contract which did not provide for bonuses, even though it knew the company had not paid bonuses to the unit in 1953.

Clearly what the Board has done in its order is to give to the union the sick leave and bonus provisions it asked for but failed to get at the bargaining table in 1953. The Board attempts to justify this action by referring to "assurances" made early in the negotiations. This causes us to wonder how far a party to collective bargaining negotiations will be bound by any statement made during negotiations which is not later included in the written contract.

We submit that good faith bargaining requires

fluidity of position among the participants. There must be give and take. Statements made and concessions given now give way to others subsequently made in the interchange of proposals which is the very essence of bargaining. It should be noted that the statements of the company relied on by the Board were made early in negotiations, prior to an agreement on wages. It is more reasonable to assume, as did dissenting Chairman Leedom, that any disparity between the company's statements during negotiations and its conduct thereafter was due to the substantial wage increase later agreed upon. Such a lawful explanation is, we submit, more reasonable than the unlawful one inferred by the Board, particularly when viewed in the light of all the other circumstances.

In conclusion of the argument of Point No. IV we submit that the result of the Board's order here is to discourage good faith collective bargaining. Why should a union bargain in good faith on all issues if is can concentrate on wages and then, after getting an increase much greater than may have otherwise been possible, come to the Board and get additional benefits. Such a result does violence to the fundamental purposes of the Act and should not be allowed to stand.

CONCLUSION

In summary we submit:

1. That illegal motive and intent are essential elements of a case of a section 8 (a) (3) violation.

2. That the burden is upon the General Counsel to prove such illegal motive and intent rather than

upon the employer to prove his purity of motive.

3. That although the necessary motive and intent may be inferred from the conduct complained of in a proper case, such an inference cannot and should not be made in the face of express, clear, and uncontroverted evidence of non-hostility and no anti-union bias.

4. That proof of the company's non-hostility and no anti-union bias is clear in this case and the Board erred in failing to make a finding to that effect.

5. That the record does not show that the company had a paid sick leave policy which was denied to the employees in the unit.

6. That the discriminatory treatment complained of is not so patently disparate as to inherently discourage union membership, but rather the benefits guaranteed to the employees in the unit far outweigh any benefits given to the other employees and not to those in the unit.

7. That the order of the Board does not promote the basic purposes of the Act in encouraging collective bargaining, but, on the contrary, it does violence thereto.

The order of the Board is not supported by the record considered as a whole and is contrary to the law. It should be set aside and the Board's request for enforcement should be denied.

Respectfully submitted,

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